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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT VINCENT WILLIAMS et al., Defendants and Appellants.	B203616 (Los Angeles County Super. Ct. No. NA065871)

APPEALS from judgments of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed as modified.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Robert Vincent Williams.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant Keith Lee Jones.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Vincent Williams and Keith Lee Jones appeal from judgments entered following a jury trial in which they were convicted of first-degree murder (Pen. Code, § 187, subd. (a))[1] committed for the benefit of, at the direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)(1)(A)). The jury found true that in the commission of the murder a principal personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d) and (e)(1)). In addition, the jury convicted Williams and Jones each of carrying a concealed firearm in a vehicle (§ 12025, subd. (a)(1)), of unlawful possession of a loaded firearm by an active gang member (§ 12031, subd. (a)(1)), and found true that these crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Williams and Jones contend (1) they were deprived of due process and the right to a fair trial due to prejudicial prosecutorial misconduct during closing argument, (2) trial counsel rendered ineffective assistance by failing to object to the misconduct and to inadmissible testimony, (3) the trial court erred in denying a motion for new trial based on newly discovered evidence demonstrating Williams's actual innocence of the crimes, and (4) the trial court committed numerous sentencing errors. Their claims of sentencing error have merit and we will correct the judgments accordingly. As so modified, we affirm.

BACKGROUND

The Murder

The Insane Crips and the Rolling 20s Crips are rival criminal street gangs in the Long Beach area. The two gangs' territories overlapped and many of their members lived in the same neighborhood, knew each other, attended the same schools, and had relatives in common.

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[1] All further unmarked statutory references are to the Penal Code.

Appellants Williams and Jones were members of the Rolling 20s, as was Kalup Hartley, a key witness in the case, and Williams's and Jones's codefendants Kassiem Warnick and Michael Sanders whose cases were severed from Williams's and Jones's for trial.

In the evening of April 9, 2005, a group of young people congregated outside the Jacobs's residence on Olive Avenue in Long Beach near 20th Street. Lionel Jacobs was an Insane Crips member and his younger brother, Lamar Jacobs, associated with Insane Crips gang members. Michael Green, an aspiring professional skateboarder, and not a gang member, was among the persons gathered outside Jacobs's residence.

A group of men approached on foot carrying guns. The men called out Rolling 20s slogans and began firing their weapons. Persons outside the Jacobs's residence scattered, except for Green who was fatally shot. He sustained a through-and-through bullet wound to his cheek which also severed his jugular vein. A second bullet penetrated Green's hip, a fragment of which the coroner recovered.

Police officers recovered seven nine-millimeter shell casings and four .40 caliber shell casings from the intersection of Olive Avenue and 20th Street near the murder scene. The officers recovered two additional .40 caliber shell casings from the front of another residence on 20th Street.

Recovery of .40 Caliber Firearm

On April 16, 2005, sheriff's deputies responded to a disturbance call concerning a large group of gang members in Mayfair Park, Lakewood. When they approached the group, three individuals ran away. As the deputies gave chase, Rolling 20s gang member Warnick threw a gun into a trashcan. The deputies arrested Warnick and detained his companions Hartley and Jovan Barber. They retrieved a loaded Beretta .40 caliber semiautomatic handgun from the trashcan. Based on ballistics testing of the gun and comparisons with the .40 caliber shell casings found at the Green murder scene, an expert opined that the murder scene shell casings had been fired from this .40 caliber Beretta semiautomatic handgun.

Williams's and Jones's Arrest and Recovery of the Nine-Millimeter Handgun

On May 24, 2005, an undercover detective observed the attendees at the funeral for Rolling 20s gang member Maurice Brown. The detective saw Williams drive up in a new white Mustang with Barber in the passenger seat. From his position the detective could not see who if anyone was in the backseat.

Later that same day a new white Mustang stopped in front of a residence on Pasadena Avenue near 20th Street in Long Beach and a thin, young, black male leaned out of the passenger side window and fired a handgun. A resident alerted police who began searching for a new white Mustang. At the scene of the shooting, officers recovered three shell casings from the curb in front of the witness's house.

Approximately an hour later police officers conducted a felony stop at 20th Street and Long Beach Boulevard of a new white Mustang registered to a William's family member. Williams was the driver, Jones was the front passenger, and Barber sat in the backseat. Officers detained the three men. A search revealed a .38 caliber Colt revolver handgun hidden in the driver's side of the center console and a loaded black Firestar semiautomatic nine-millimeter handgun secreted in the passenger's side of the center console. The police arrested the men. Based on ballistics testing and comparisons, an expert opined that the bullet fragment found in Green's hip, all seven nine-millimeter shell casings found at the Green murder scene, and the three shell casings found at the shooting reported earlier in the day on Pasadena Avenue, had all been fired from the Firestar.

Eyewitness Testimony

Citizen Witness

The night of Green's shooting police officers interviewed a neighbor. She reported that after hearing a "barrage" of shots, she looked out her living room window and saw three men running along the side of her apartment building. One of the men held a shiny gun in his hand, contrasted against his dark skin. She heard the men arguing as they ran into the alley, got into a car, and sped off.

Eyewitness Michael Wright

Officers interviewed Michael Wright at the police station on June 9, 2005 regarding Green's murder. A tape recording of the interview was played for the jury. In the interview Wright said that he was outside the Jacobs's residence talking to Green, Lamar Jacobs, a young woman, and someone named DeDe. Lamar's older brother Lionel was inside the house with Lamar's sister. While standing outside Wright saw an older white Cadillac drive on 20th Street past the residence twice and then park a short distance from the residence. Moments later he saw Jones, Sanders, and a third young black man, each holding a handgun, walk toward them from the direction of the parked Cadillac across the street. Jones stopped in the middle of the street, raised a black semiautomatic handgun, and fired it. Wright ran down the street and everyone else ran into the Jacobs's backyard.

Wright selected Jones's photo from a photo array, stating "'That's [Jones] and he's the one who took the first shot at the crowd and killed [Green] that night.'"

At trial Wright denied knowing Lamar and Lionel Jacobs, denied being at their house the night Green was killed, denied associating with Insane Crips members, and denied being threatened or afraid to testify. Wright testified that almost everything he said in his taped interview with the police was a lie.

Eyewitness Lamar Jacobs

Police interviewed Lamar Jacobs a month later on July 5, 2005. A tape recording of his interview was played for the jury. During the recorded interview the police described Lamar's unrecorded statement in which he claimed that he was inside the house with his brother, sister and parents and did not see the shooting. Lamar then explained he was scared to admit that he had witnessed the shooting. Lamar said that he felt pressured to speak after officers told him another witness had already placed him at the scene and after his mother telephoned the detectives and reportedly urged Lamar to tell the truth.

He then admitted being present outside his house with Green and two other friends on the night Green was killed. He saw Jones, Williams, Sanders, and Warnick holding guns as they walked towards his group. The four men stepped off the sidewalk and walked diagonally across the street from the corner of 20th Street and Olive Avenue. As they approached they "yelled out" Rolling 20s gang slogans. Lamar said that he knew "something bad" was going to happen and ran into his backyard. Moments later he heard the first volley of shots and seconds later he heard a second volley of shots. When the gunfire stopped Lamar returned to the front yard and saw that Green had been shot.

In viewing photographic lineups during the interview Lamar began to circle Jones's photo but then stopped, noting on the photo "'It could've been Striker [Jones], but I didn't see his face. This happened on the night that [Green] was killed.'" Lamar picked Williams's photo from another photo array and stated, "'That's Tech [Williams]. I saw him approach [Green] with a gun in his hand.'"

At trial Lamar testified that he was inside his house and did not see the shooting. He said that the detectives pressured him during the interview to talk about the shooting but he merely repeated what his friend Deshawn had told him about the shooting.

Eyewitness Kalup Hartley

Police officers interviewed Hartley on November 30, 2005. His recorded interview was played for the jury. The day of Green's murder Hartley attended a barbecue at Jones's house after which Jones, Hartley, and Barber left in Barber's black SUV to pick up Sanders. After picking up Sanders they drove past Lionel Jacob's house on Olive Avenue and 20th Street a few times and eventually Barber parked the SUV in an alley off Olive Avenue. Per telephone arrangement, moments later Williams drove up behind them in a light-colored car with Warnick as his passenger. Hartley thought the car was a BMW.

Jones and Barber got out of the SUV while Hartley and Sanders stayed seated in the backseat. Williams and Warnick exited their car and joined Jones and Barber. Hartley thought the foursome outside the car were going to meet some women. Moments

later Hartley heard at least 10 gunshots. A minute later he saw Williams, Jones, and Barber approaching. He heard another shot and seconds later he saw Warnick appear in the alley. The men then got into their respective cars and drove off.

Hartley's testimony at trial, under a grant of use immunity, was essentially the same as his recorded statement.

Jones's Jail Cell Telephone Calls

Police recorded Jones's jail cell telephone conversations. In one conversation Jones bragged that he would "beat" the gang allegation because he did not appear in law enforcement files as a gang member and because he did not have obvious gang tattoos. Jones then talked about "beating" the "hot one," commenting that "if they drop it down to manslaughter and seven years I'm, I'm gonna jump on that motherfucker." In another conversation Jones asked the caller to pack the courtroom with his friends and relatives and stated that he did not want any gang members in the courtroom. The next day Jones had a conversation with another person who referred to Jones as an "O. G.," or a respected "original gangster," who was "harder" than the others. Jones explained that "[w]hen I be out there, I don't be playing no game." Jones elaborated, "I don't be playing. I don't let nobody disrespect me and you know and I try to do how it's suppose to go down you know, how everything is suppose to go like if I was out there, well none of that shit be happening right now." In a later conversation Jones explained that when an Insane Crip killed his friend John Butler, Jones was "off, you know, off some other revenge type stuff."

Jones also talked about the witnesses in this case. He referred to Hartley "getin' down on [him]" and how "that crushed [his] heart." Jones noted that police found no useable fingerprints on either gun (apparently referring to the guns found in the white Mustang when he was arrested), but remarked that several witnesses placed him at the murder scene and that one witness said he had "shot, which I didn't shoot at all." Jones told another caller he had "dirt" on Lamar and Lionel Jacobs he intended to use against

them at trial and complained that "the homies, they like snitching and stuff, I'm up there work on two homies and, three homies and two Insane [Crips]."[2]

Defense Witnesses

Tech Sun Ov

On the night of Green's murder Ov was in his residence at the corner of 20th Street and Olive Avenue. Ov testified that he heard a lot of gunshots and looked outside his bedroom window. He saw two persons sitting in a car parked in front of his house which appeared to be a dark blue Honda. The car moved from the corner and parked approximately 200 feet away. Ov thought the two people in the car looked Asian. He testified that he had seen one of the Asian persons earlier in the day and at that time the person had colored stripes in his hair and was speaking to a black male.

Tommie Lee Meyers

Meyers testified that on the night of Green's murder he was across the street from the Jacobs's residence providing security at a baby shower for his cousin. While outside he saw a metallic green Chevy Tahoe SUV drive down Olive Avenue several times. Meyers, however, said that he did not "know [his] colors" and did not wear his "glasses at night because the women like to look [at him]." At first Meyers testified that after the green SUV drove by he heard some shots fired near the alley. He later testified that he heard the shots as the green SUV drove by. He also testified that a single unidentified man walked up to Green and shot him. According to Meyers, Green died in his arms.

Lionel Jacobs

Lionel Jacobs testified that his parents, his brother Lamar, and he were all inside the house when he heard gunshots. He ran outside and saw that Green had been shot. Tommie Lee Meyers was standing nearby as Lionel held Green in his arms while they

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[2] Neither Williams nor Jones challenges the sufficiency of the evidence to support the criminal street gang findings and accordingly we dispense with a recitation of the gang expert's testimony.

waited for paramedics to arrive. Lionel admitted that he had been an Insane Crips gang member at ages 15 and 16, but denied that now, at almost age 22, he was still a member. Lionel, however, also admitted that he had been convicted of attempted murder a few months earlier and that the jury had found gang allegations true.

Defense Investigator

Jones's investigator interviewed Lionel Jacobs at the Twin Towers jail twice in one day. On the first visit he interviewed Lionel alone. At the second interview Jones's defense counsel was present and conducted most of the interview. The investigator prepared two separate reports of the interviews. The second report, but not the first, included Lionel's statement that his brother Lamar was inside the house with the rest of the family when Green was shot.

Procedural Background

An amended information charged Williams and Jones with Green's murder (§ 187, subd. (a)) and alleged that the crime was committed for the benefit of, at the direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)(1)(A)) and further alleged that a principal had personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d) and (e)(1)). The information also charged Williams and Jones each with carrying a concealed firearm in a vehicle (§ 12025, subd. (a)(1)), of unlawful possession of a loaded firearm by a gang member (§ 12031, subd. (a)(1)), and alleged that these crimes had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). As to Williams, the information alleged that he had suffered a prior "strike" conviction (§§ 667, subds. (b) – (i), 1170.12, subds. (a) – (d)) for which he had served a prior prison term (§ 667.5, subd. (b)). The jury convicted Williams and Jones as charged and fixed the degree of murder at first degree. In a separate proceeding Williams admitted the prior "strike" and prison term allegations. The court sentenced Williams to an aggregate term of 120 (or 110 according to the clerk's transcript) years to life in state prison and Jones received an overall term of 60 years to life.

DISCUSSION

PROSECUTORIAL MISCONDUCT

Jones and Williams[3] contend that the prosecutor committed misconduct in closing arguments to the jury by (1) improperly vouching for witnesses, (2) arguing facts outside the evidence, (3) misstating the evidence, (4) appealing to the jury's sympathy for the victim, and (5) attacking the integrity of defense counsel. They argue that these errors were prejudicial and require reversal of the judgment. We disagree.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Ibid.*)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Although defense counsel objected to many of the claimed acts of misconduct, this was insufficient to preserve the claims for review because counsel did not adequately

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3 Each joins in the other's arguments to the extent applicable.

articulate the grounds of the objections. Accordingly, Williams's and Jones's claims of prosecutorial misconduct have been forfeited for purposes of review. (*People v. Miller* (1990) 50 Cal.3d 954, 1001.) Nonetheless, even if Williams's and Jones's failure to preserve these claims for review is ignored, we reject all the claims on the merits. Once placed in context, the improper comments did not prejudice Williams's or Jones's case.

Arguing Facts Not in Evidence/Improper Vouching

Williams and Jones claim the prosecutor committed three instances of misconduct in his closing argument when attacking defense witness Tommie Lee Meyers.

They contend the prosecutor referred to facts not in evidence when he argued that Meyers told the jury "something entirely different in court than he [did] when he gave his statement back in November 2005." They correctly point out that Meyer's statement to police in November 2005 was neither admitted nor was he impeached by any statements in the report during the evidentiary portion of the trial.

Referring to facts not in evidence is "'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 828.)

Although the prosecutor's argument was improper because it lacked factual support, the argument likewise lacked any likely effect on the jury. At trial Meyers testified to alternative and inconsistent versions of the shooting that: (1) the shots came from the alley down the street from the residence, (2) someone inside the green Chevy Tahoe SUV fired shots as the driver drove past the residence, and (3) a single person walked up to Green and shot him. That Meyers may have given one of these versions, or a different version, of the shooting to the police in November 2005 was likely insignificant to the jury in the context of this case.

Next, Williams and Jones contend the prosecutor argued facts outside the evidence by commenting in closing argument that Green's mother had "storm[ed] out [of the courtroom] in hysterics and the door slammed" during Meyer's testimony, upset by Meyer's lies. We agree that his argument was improper. Nonetheless, Jones and Williams cannot show prejudice. Meyers's own testimony undermined his credibility. He claimed that "he did not know his colors" yet identified a green Chevy Tahoe SUV as the vehicle involved in this shooting. He testified that he saw one person walk up and shoot Green, yet admitted he was not wearing his glasses that evening because women "liked to look at him" without his glasses. He described two additional alternative and inconsistent versions of the shooting as well, that someone shot from the green SUV as it drove past the residence and that the shots came instead from the alley down the street. Further, the court instructed the jurors that the attorneys' statements were not evidence (CALJIC No. 1.02) and that they were to consider only evidence received at trial and not from any other source (CALJIC No. 1.00). We presume the jurors followed the court's instructions. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.)

Williams and Jones also contend the prosecutor engaged in "vouching." "Tommie Meyers, that's the star witness. I mean, you know, if you believe Tommie Meyers, you have to discount the other evidence because what Tommie Meyers is saying is totally different from everything else, the ballistics evidence, the witnesses, the people that were part of this murder, the people that weren't. But if you believe Tommie Meyers, yes, ladies and gentlemen, you have to find the defendants not guilty. That's a choice you have to make. That's why we have a jury system. But that's also why we deliberate and you have to share and talk about your idea and you have to be prepared to deal with the other jurors and explain yourself if that's the road you want to go down. But I know the evidence and the jurors, I just don't see that happening. Because it is not reasonable and it is totally inconsistent with the evidence."

Contrary to Jones's and Williams's contention, the prosecutor was not "vouching" for a witness. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 257 [impermissible

vouching may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony].) This was instead fair comment on the evidence actually presented at trial. The prosecutor's argument reminded the jurors that Meyer's testimony was not only internally inconsistent, but also conflicted with all the evidence in the case, and that for these reasons it would be unreasonable to accept his testimony as true.

Similarly, it was not misconduct for the prosecutor to argue (based on Lamar's recantation of his earlier statement to police) that Lamar and Lionel were lying when they testified Lamar was inside the residence and did not see the shooting. A prosecutor is entitled to comment on a witness's credibility based on evidence before the jury. Here the jury was aware from the evidence that Lamar had recanted his earlier statements to police. (See, e.g., *People v. Thomas* (1992) 2 Cal.4th 489, 529 [a prosecutor is entitled to comment on the credibility of witnesses based on the evidence adduced at trial and may characterize testimony as perjurious when warranted].)

Williams and Jones label as misconduct the prosecutor's clarification in closing argument that he had made a mistake when, in a taped conversation with Lamar, he had said that Lamar had been interviewed several times when he meant to say that during Lamar's single interview Lamar provided multiple versions of the events the night of Green's shooting. We disagree that this remark constituted improper vouching by the prosecutor for his own testimony rather than just an acknowledgement that he had made a mistake. The jury heard a tape recording of Lamar's recorded statement and from that recording knew Lamar had in fact provided different versions of the events during his one interview. The investigating officer similarly testified that he had interviewed Lamar only once and that during that interview Lamar provided differing versions of Green's shooting. The prosecutor's statement in closing argument was no more than a comment on the evidence before the jury and it is improbable the jury misconstrued the remark to mean anything else. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

Misstating the Evidence

Williams and Jones next cite as misconduct an instance in which the prosecutor misstated the evidence. Lionel Jacobs had testified that he and Green had intended to go out and "cruise" Crenshaw Boulevard on the night Green was killed. In closing argument the prosecutor stated, "I find it very interesting that at 2015 [8:15 p.m.], the officer goes there that night and no one sees nothing, the whole Jacobs' family, and I find it very interesting and I don't know if you caught it that Lionel Jacobs, who got very emotional and talked about Michael dying in his arms, if you remember I asked him, he still went to Crenshaw that night. . . . People are murdering each other, innocent people are getting killed on a regular basis and we have a young man who claims to be such a great friend and this young innocent man died in his arms and within a few short hours he's out there going to Crenshaw to look at cars."

Lionel did not testify that he went out "cruising" the night Green was killed, either before or after the murder, and no other evidence supported the prosecutor's argument on this point. The error, however, was not prejudicial because the prosecutor's remarks were brief and any error was cured by the court's instructions informing the jury that they were the judges of the evidence (CALJIC No. 1.00) and that the attorneys' statements were not evidence. (CALJIC No. 1.02.)

Impugning the Integrity of Defense Counsel

Williams and Jones complain that the prosecutor engaged in misconduct in arguing that Jones's defense counsel tried to manipulate the evidence by coaching Lionel to state that Lamar had been inside the house during the shooting. Specifically, in responding to Jones's counsel's insinuations that law enforcement had taken advantage of Lamar's youth and inexperience by manipulating him into telling the officers what he knew about Green's shooting the prosecutor stated, "how ironic it is, how ironic that you should be use[d] to this, but it's the police and [the] D.A. [] railroading these poor guys. The only evidence that you heard, evidence of somebody trying to put word[s] in a witness' mouth or trying to create evidence or manipulate evidence came from yesterday,

[the defense investigator][.]" The prosecutor then reviewed the evidence, mentioning that the defense investigator interviewed Lionel Jacobs twice in the same day because Jones's defense counsel had been dissatisfied with the thoroughness of his first interview. The prosecutor stated only during his second interview did Lionel Jacobs state that Lamar had been inside the house with the rest of the Jacobs family and did not witness the shooting. The prosecutor then argued, "You know, that should cause you some concern. That is basically trying to coach a witness or create some kind of statement. But that's for you to consider. You need to go back there and know the full picture. And how ironic that the police are bad and D.A.'s office is corrupt. That's the kind of stuff that's in evidence."

Williams and Jones complain that the prosecutor's argument implied Jones's defense counsel was responsible for manipulating Lionel's testimony and that his argument thus constituted an improper attack on defense counsel's integrity.

"It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense (*People v. Perry* (1972) 7 Cal.3d 756, 789-790; *People v. Bain* (1971) 5 Cal.3d 839, 845-847), or to imply that counsel is free to deceive the jury (*People v. Bell* (1989) 49 Cal.3d 502, 538). Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184, citing *People v. Thompson* (1988) 45 Cal.3d 86, 112.)" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.)

Although we do not endorse the prosecutor's argument suggesting that defense counsel deliberately manipulated evidence, the comment so suggesting did not render the trial fundamentally unfair as there is no reasonable likelihood that the prosecutor's argument misled the jury as to its task of determining Williams's and Jones's guilt. The prosecutor's comments related to Lionel Jacobs's statements whose credibility as a witness was already severely impeached by the evidence of his former gang membership and recent conviction for attempted murder. Possible prejudice was further mitigated by

the court's instruction that counsels' arguments were not evidence (*People v. Valdez* (2004) 32 Cal.4th 73, 134) and we presume the jury followed the court's instruction. (*People v. Smithey, supra*, 20 Cal.4th at p. 961.) Accordingly, the prosecutor's improper argument did not prejudice their case. (*Donnelley v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [to be prejudicial the misconduct must render the trial fundamentally unfair]; *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [prejudicial misconduct constitutes a deceptive or reprehensible method of persuasion].)

Appeal To Jurors' Sympathy For The Victim

Finally, Williams and Jones cite as misconduct the prosecutor's statement in closing argument improperly appealing to the jurors' sympathy for the victim. The prosecutor stated, "I'm sorry, you know, if you're offended that I have absolutely no sympathy for Lamar Jacobs, Michael Wright, Kalup Hartley, then so be it, my sympathy falls for one person in this case and that's the victim."

A prosecutor's argument to the jury that appeals to sympathy for the victim is inappropriate during an objective determination of guilt. (*People v. Salcido* (2008) 44 Cal.4th 93, 151.) To the extent the prosecutor's expression of sympathy for the victim was improper, we cannot conclude it prejudiced Williams's and Jones's case. The comment was brief and did not dwell on any gruesome details, suffering of the victim or his family. Moreover, any error was cured by the court's instruction that the jurors were not to be "influenced by sentiment, conjecture, sympathy, passion, prejudice or public opinion or feeling." (CALJIC No. 1.00.) Williams and Jones have failed to show how the prosecutor's single reference to sympathy for the victim prejudiced their trial. (See *People v. Fields* (1983) 35 Cal.3d 329, 361, 363 [no prejudice found when the prosecutor

unmistakably appealed to the sympathy of the jury, asking them to "'think of yourself as [the victim]'"].)[4]

INEFFECTIVE ASSISTANCE OF COUNSEL

Williams and Jones claim trial counsel rendered constitutionally deficient assistance by failing to make appropriate objections to the alleged instances of prosecutorial misconduct in closing argument and by failing to object to the investigative officer's allegedly prejudicial and inadmissible opinion testimony. We disagree.

A defendant asserting a claim of ineffective assistance of counsel must show both that his trial counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Prosecutorial Misconduct

As stated in the previous section, the instances of prosecutorial misconduct in closing argument were not prejudicial. For these reasons Williams and Jones cannot show that the result of the trial would have been different in the absence of counsels' failure to properly object and request the court to admonish the jury. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 693-694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 216-218.)

Investigating Officer's Opinion Testimony

Police officers tape recorded the telephone calls Jones made from his jail cell. In one such call Jones remarked that several witnesses placed him at the shooting scene and that one witness said he had "shot, which I didn't shoot at all." On redirect examination of the investigating officer, the prosecutor inquired whether Jones's comment was

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[4] Williams and Jones do not argue that the cumulative effect of all the errors prejudiced their case, requiring reversal of the judgment. In any case, we do not believe that, even considering all the errors together, they have shown prejudice.

"significant" to him. The investigating officer replied, "Absolutely," and gave his opinion that Jones's statement "indicate[d] that he's not denying that he was at the crime scene from the call. It indicate[d] that he's saying apparently he wasn't the one that fired a weapon."

Williams and Jones contend the officer's testimony constituted improper expert opinion testimony regarding ordinary words any reasonable juror "was quite capable of figuring out alone." They claim counsel rendered ineffective assistance by failing to object to this testimony and that this failure prejudiced their case.

The officer's testimony was not based on any purported special expertise but was instead just a logical conclusion any juror could have drawn from Jones's words. The officer's testimony regarding logical inferences from the words used thus likely had little, if any, effect on the jury's determination of guilt because the jurors were capable of drawing the same conclusion on their own or rejecting it. (Cf. *People v. Hernandez* (1977) 70 Cal.App.3d 271, 281 [error in admitting expert testimony where none is needed may be entirely harmless where the expert really adds nothing to what must be apparent to the jury's common sense].)

Because Williams and Jones have failed to demonstrate a reasonable probability of a more favorable outcome absent the officer's testimony their claim of ineffective assistance of counsel fails. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 693-694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 216-218.)

NEW TRIAL MOTION

Following his conviction, Williams filed a motion for new trial based on allegedly newly discovered evidence from Warnick which he claimed demonstrated his actual innocence of Green's murder. He attached as an exhibit a copy of a police report which included a summary of Warnick's proffer made in connection with negotiating a plea to the murder of Green he entered after this trial. In it he admitted being involved in Green's murder and stated that he, Sanders, Jones, and Hartley drove to a residence on Olive Avenue in Long Beach to shoot at rival gang members who had been congregating

on the sidewalk in front of the house. Warnick said that he, Sanders, and Hartley all fired their weapons, and although Jones had a gun, Warnick did not see Jones shoot it. According to the police report another portion of Warnick's interview was tape recorded and in this portion Warnick discussed Green's shooting in further detail and discussed his "relationship" with Williams and Butler.

Williams's counsel represented that in the taped portion of the interview Warnick stated that he did not know Williams and that Williams had not been involved in Green's murder. Williams's counsel asserted that Warnick's statements constituted direct evidence of William's actual innocence which warranted a new trial. Counsel argued that Warnick's statements should be credited because the prosecution had offered Warnick a six-year prison term in exchange for a guilty plea to the lesser offense of manslaughter, stating that "[t]he people apparently believe this statement or they would not have accepted the proffer. That is, as the court well knows, when a proffer is made, the purpose of the proffer is for the district attorney's office to determine whether or not the testimony is sufficiently truthful to offer a deal. [¶] In this case, they apparently felt that this statement was truthful or they would not have made the deal."

The prosecutor reminded the court that Warnick had been offered the same plea arrangement before Jones's and Williams's trial but that Warnick had refused it because it would have required him to testify against Jones and Williams. After Williams's conviction, and with the offer of a plea to manslaughter, the prosecutor argued that Warnick simply took advantage of the opportunity to exonerate Williams with whom the prosecutor asserted Warnick had a close relationship. The prosecutor explained that the reason Warnick was offered a plea deal was because the evidence of his involvement in Green's murder was weaker than was the evidence against Jones and Williams.

The trial court denied William's motion for new trial concluding that Warnick's statements did not create a reasonable probability of a more favorable outcome for Williams given the "overwhelming" evidence of his guilt.

A motion for new trial may be based on newly discovered evidence. (§ 1181, subd. (8).) A trial court's ruling on a motion for new trial "'"'"'rests so completely within [its] discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'"'"' (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252.)

The prerequisites for granting a motion for new trial based on newly discovered evidence are: "'1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'" (*People v. Martinez* (1984) 36 Cal.3d 816, 821.)

Williams contends that Warnick's statements exonerating him of involvement in Green's murder was newly discovered evidence within the meaning of section 1181. Williams reasons that Warnick was a charged defendant who was awaiting trial during Williams's trial and for this reason would have invoked the privilege against self-incrimination making him "unavailable" to testify. Thus, Williams asserts, Warnick's testimony was "unknown" until after Jones's and Williams's trial concluded and "newly discovered" for purposes of his new trial motion. We disagree.

A defendant has a privilege not to be called as a witness as well as a privilege not to testify at his own trial. (*People v. Ford* (1988) 45 Cal.3d 431, 440.) These privileges do not apply to possible accomplices as witnesses at the trial of a separately tried codefendant. As to these witnesses, assuming their whereabouts are known, they are subject to subpoena and "available" to testify. (*Ibid.*) Witnesses, even jointly charged but separately tried, have no unqualified right to exercise the privilege against self-incrimination. In order to invoke the privilege against self-incrimination, and thus be considered "unavailable," the witness must be called, the witness must be sworn, and an assertion of the privilege upheld by the trial court with respect to a particular question as

having a tendency to incriminate the witness. (*Ibid*.) As the Supreme Court has noted, "[w]ere [it] to accept the proposition that a witness is 'unavailable' because he might claim the privilege if called, that prerequisite to exercise of the privilege would be abandoned and the reasons for its existence ignored." (*Ibid*.)

The parties knew Warnick was then incarcerated and could be subpoenaed to testify at Williams's trial. He was thus literally "available" as a witness. Because his testimony could have been presented at Williams's trial had he been called and sworn as a witness Warnick's evidence was not "newly discovered." This being the case, Williams has failed to satisfy a crucial requirement for granting a new trial on the ground of newly discovered evidence. (Cf. *People v. Shoals* (1992) 8 Cal.App.4th 475, 487 [witness was legally "unavailable" at trial where the trial court upheld the witness's invocation of her privilege against self-incrimination on the witness stand, and her statements made after she renounced her privilege constituted newly discovered evidence for purposes of defendant's new trial motion].)

Williams argues that he should not be punished for counsel's lack of diligence where the new evidence was such that justice required granting a new trial even though proper diligence was not exercised to present the evidence at his trial. (Citing, *People v. Martinez, supra*, 36 Cal.3d at p. 825 [the standard of diligence may be relaxed when the newly discovered evidence would probably lead to a different result on retrial].) That principle may apply in a case where "new" evidence contradicts the strongest evidence against the defendant and thus has the potential to lead to a different result on retrial. (See *People v. Shoals*, *supra*, 8 Cal.App.4th at p. 488.) It is inapplicable when the new evidence merely has the potential to create a conflict in the evidence without creating a reasonable probability of a different outcome.

In the present case, the court found Warnick's testimony lacked "sufficient strength as to indicate the probability of a different result in [a] retrial with that evidence produced." No manifest abuse of discretion appears. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1252.) A court is not bound to accept as true statements which attempt to

absolve a fellow confederate convicted of the crime. In such cases, the court is entitled to regard the statement "with distrust and disfavor." (See *People v. Shoals*, *supra*, 8 Cal.App.4th at p. 488; see also, *People v. Earp* (1999) 20 Cal.4th 826, 890 [it was not an abuse of discretion for the trial court to deny the defendant's motion for new trial where the trial court found the newly discovered evidence was inherently untrustworthy and not worthy of belief].) The trial court in this case had reasons to view Warnick's statement with suspicion. Warnick had been jointly charged with Williams for Green's murder based on eyewitness testimony placing him at the murder scene with Williams. This evidence tended to suggest that the two men knew each other, making Warnick's assertion that he did not even know Williams suspect. Additionally, Warnick's statements purporting to exonerate Williams were not presented to the court in a sworn affidavit. (§ 1181, subd. (8) [for a motion for new trial based on newly discovered evidence "the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given"].) This failure in combination with Warnick's suspect statements as a fellow confederate were sufficient reasons for the trial court to deny the motion. (See *People v. House* (1969) 268 Cal.App.2d 922, 924; *People v. Clark* (1967) 251 Cal.App.2d 868, 872.)

SENTENCE ENHANCEMENT FOR VICARIOUS USE OF A FIREARM

Williams and Jones attack the 25-year-to-life enhancements imposed on the murder conviction for the vicarious use of a firearm under section 12022.53, subdivisions (d) and (e)(1). They argue that 12022.53, subdivision (e)(1) singles out aiders and abettors for drastically increased punishment in cases in which a criminal street gang enhancement is pleaded and proved. They contend this different treatment violates equal protection because other similarly situated aiders and abettors of shooting deaths are subject to far less punishment. They contend section 12022.53, subdivision (e)(1) also violates due process because it authorizes the 25-year-to-life enhancement without requiring a finding that the aider and abettor knew the perpetrator's criminal purpose and shared the perpetrator's intent.

These identical arguments have been considered and rejected by the Courts of Appeal and we find their reasoning persuasive. (See *People v. Hernandez* (2005) 134 Cal.App.4th 474, 480-483; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12-15.)

DOUBLING FIREARM ENHANCEMENT

Williams admitted suffering a prior "strike" conviction within the meaning of the Three Strike law. In sentencing Williams the trial court imposed an indeterminate 25-year-to-life term on the murder conviction and doubled the term to 50 years to life. The court then imposed an additional and consecutive 25-year-to-life term for the firearm enhancement and also doubled that term to 50 years to life.

Williams argues that the trial court erred in doubling the term imposed for the firearm enhancement claiming the Three Strikes law does not authorize the doubling of terms imposed as sentence enhancements. Williams's claim has merit. (See *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433 ["In sentencing a defendant who has one prior strike, the court may not double any enhancements it imposes"]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 424 ["the terms for the offenses themselves must be doubled for a 'second strike' defendant, but no term for an enhancement is doubled"].) The People concede the error and we will order the judgment modified accordingly.

TEN-YEAR GANG ENHANCEMENT

Williams and Jones argue, the People concede, and we agree that the trial court erred in imposing 10-year criminal street gang enhancements under section 186.22, subdivision (b)(1)(C) on the murder conviction where the sentence imposed was an indeterminate term of 50 and 25 years to life respectively. In these circumstances, they argue, the trial court was required to specify a minimum of 15 years for parole eligibility rather than impose the 10-year gang enhancements.

Section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when such a defendant

commits a violent felony. Section 186.22, subdivision (b)(1)(C) does not apply, however, where the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) applies and imposes a minimum term of 15 years before the defendant may be considered for parole. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1006-1007, 1011 [10-year gang enhancement did not apply to defendant's 25-year-to-life term imposed for first-degree murder but the alternative of a minimum of 15 years for parole eligibility did apply].)

Williams's minimum eligibility for parole, as a "second strike" offender, however, is subject to the Three Strikes law and must be doubled to 30 years. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 90, 101 [section 186.22, subdivision (b)(5) establishes a minimum term of 15 years before parole eligibility that is subject to doubling under the Three Strikes law].)

DISPOSITION

Jones's sentence for the murder conviction in count one is modified to delete the gang enhancement imposed under section 186.22, subdivision (b)(1)(C) and to instead specify a 15-year minimum parole eligibility date. (§ 186.22, subd. (b)(5).) As so modified, Jones's judgment of conviction is affirmed.

Williams's sentence for the murder conviction in count one is modified (1) to delete the gang enhancement imposed under section 186.22, subdivision (b)(1)(C) and to instead specify a 30-year minimum parole eligibility date (§ 186.22, subd. (b)(5)) and (2) to correct the term imposed on the firearm enhancement under section 12022.53, subdivision (d) and (e)(1) to reflect instead a term of 25 years to life. As so modified, Williams's judgment of conviction is affirmed.

The trial court is directed to prepare new abstracts of judgment reflecting these changes and to forward them to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.